80-341

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No. ____

In the Supreme Court of the United States

October Term, 1980

STEPHEN DIRK WERNETH, PETITIONER

vs.

STATE OF IDAHO, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

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A

QUESTION PRESENTED FOR REVIEW

HAS THE PETITIONER'S CONSTITUTIONAL RIGHT NOT TO BE TWICE PLACED IN JEOPARDY FOR THE SAME CRIMINAL OFFENSE BEEN VIOLATED?

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No. 1

In the Supreme Court of the United States

October Term, 1980

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

Stephen Dirk Werneth petitions for a Writ of Certiorari to review the opinions of the Supreme Court of Idaho in this case.

OPINIONS BELOW

State of Idaho v. Stephen Dirk Werneth — Supreme Court Opinion No. 12624 filed April 22, 1980.

State of Idaho v. Stephen Dirk Werneth — Order Denying Petition for Rehearing filed June 30, 1980.

JURISDICTION

In April of 1976 the Petitioner was placed on trial for embezzlement and the action was dismissed on the motion of the prosecution, after the jury was sworn and witnesses testified. Later charges of embezzlement were again placed

against the Petitioner arising out of the same set of facts. A motion was made before trial to dismiss the second complaint because of former jeopardy, which was denied. The case proceeded to trial, the jury convicted the Petitioner, who appealed to the Supreme Court of Idaho, on May 18, 1977. The Supreme Court of Idaho upheld the judgment of conviction, holding that the Defendant had not been twice placed in jeopardy for the same offense. A petition for rehearing was timely filed and was denied on June 30, 1980.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES

A. Constitution of the United States of America
Fifth Amendment —
Criminal actions — Provisions concerning —
Due process of law and just compensation clauses —
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. Constitution of the State of Idaho
Article 1 Section 13

Guaranties in criminal actions and due process of law.

In all criminal prosecutions, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend in person and with counsel.

No person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law.

C. Constitution of the United States of America
Fourteenth Amendment — Section 1

Citizenship — Due Process of Law — Equal protection.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

D. Idaho Code 18-2401 through 2407

Embezzlement Defined.-Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted. [I.C., Sec. 18-2401, as added by 1972, ch. 336, Sec. 1, p. 844.]

Embezzlement by public and corporate officers —

Every officer of this state, or of any county, city, or other municipal corporation or subdivision thereof, and every deputy, clerk, or servant of any such officer, and every officer, director, trustee, clerk, servant, or agent of any association, society, or corporation (public or private), who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it, with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement. [I.C., Sec. 18-2404, as added by 1972, ch. 336, Sec. 1, p. 844.]

Embezzlement by lessee or possessor under contract to purchase.

Every person who shall fraudulently remove, conceal or dispose of any goods, chattels or effects, leased or let to him by any instrument in writing, or any personal property or effects of another in his possession, under a contract of purchase not yet fulfilled, and any person in possession of such goods, chattels, or effects knowing them to be subject to such lease or contract of purchase, who shall so remove, conceal or dispose of the same with intent to injure or defraud the lessor or owner thereof, is guilty of embezzlement. [I.C., Sec. 18-2043, as added by 1972, ch. 336, Sec. 1, p. 844.]

Prima facie intent of lessee or renter.

It shall be prima facie evidence of intent to commit embezzlement, as set forth in section 18-2403, when

one who has, by written instrument, leased or rented the personal property of another (1) fails or refuses to return such personal property to its owner after the lease or rental agreement has expired (a) within ten (10) days, and (b) within forty-eight (48) hours after written demand for return thereof is personally served or given by registered mail delivered to the last known address provided in such lease or rental agreement, or (2) when the lease or rent of such personal property is obtained by presentation of identification to the lessor or renter thereof which is false, fictitious, or knowingly not current to name, address, place of employment, or other identification [I.C., Sec. 18-2403A, as added by 1972, ch. 336, Sec. 1, p. 844.]

Embezzlement by carrier.

Every carrier or other person having under his control personal property for the purpose of transportation for hire, who fraudulently appropriates it to any use or purpose inconsistent with the safe keeping of such property and its transportation according to his trust, is guilty of embezzlement, whether he has broken the package in which such property is contained, or has otherwise separated the items thereof, or not. [I.C., Sec. 18-2404, as added by 1972, ch. 336, Sec. 1, p. 844.]

Embezzlement by clerk, agent or servant.

Every clerk, agent or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his con-

trol or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement. [I.C., Sec. 18-2405, as added by 1972, ch. 336, Sec. 1, p. 844.]

Embezzlement by trustee, banker, agent or fiduciary.

Every trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or person otherwise entrusted with, or having in his control, property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement. [I.C., Sec. 18-2406, as added by 1972, ch. 336, p. 844.]

Embezzlement by bailee, tenant or attorney.

Every person entrusted with any property as bailee, tenant, or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same or the proceeds thereof to his own use, is guilty of embezzlement. [I.C., Sec. 18-2407, as added by 1972, ch. 336, Sec. 1, p. 844.]

STATEMENT OF THE CASE

On October 29, 1975 an Information was filed by the Prosecuting Attorney of Washington County Idaho charging the Petitioner with six counts of embezzlement by bailee [I.C. 18-2707]. On April 26, 1976 the case came to trial in District Court in Canyon County Idaho. A jury was picked and sworn and one witness was sworn and introduced testimony. At this time the State could not get any more testimony or documents into evidence because of defense objections. The State moved to amend the complaint which was denied, and the State then moved to dismiss the action, which was granted.

On June 28, 1976 the Prosecuting Attorney of Washington County again filed six counts of embezzlement against the Petitioner alleging the same acts as before except that the Petitioner was charged as a corporate officer instead of as a bailee [I.C. 18-2402]. On March 30, 1977 a motion was filed to dismiss the second Information on the grounds that the defendant had previously been charged with the same crime of embezzlement and that to try him a second time would constitute double jeopardy.

On April 5, 1977 the motion to dismiss was argued to the Court on the grounds of double jeopardy and the motion was denied. The Court said, "The Court will take the position that there was a consent and is going to do it for this reason, I would have allowed the amendment to the Information, so I don't think the defendant is being jeopardized by denying the motion."

On April 27, 1977 the defendant was convicted of the crime of embezzlement by a corporate officer and on May 18, 1977 was sentenced to serve an indeterminate period of time, not to exceed 5 years on each count, the same to run concurrently.

An appeal was timely filed with the Supreme Court of the State of Idaho contending that the Petitioner had twice been placed in jeopardy in violation of the constitutional rights. The Supreme Court of Idaho held that the Petitioner had not been placed in jeopardy twice because he was charged under a different statute the second time.

ARGUMENT

It is the position of the Petitioner that the case of *Crist v. Bretz* 437 U.S. 28 (1978), is controlling in this case.

The argument by the Supreme Court of Idaho in the present case would result in a reversal of *Crist v. Bretz* if logically followed. According to the Idaho Court the difference of proof of one year would be enough of a change of facts so as to not constitute a prosecution for the same offense.

In the present case we have consecutive prosecutions of the same individual arising out of the same set of facts and circumstances. The law is quite clear that the Petitioner was in jeopardy when the jury was sworn in the first trial. To place him on trial a second time for the same acts he committed and was charged with the first time clearly violates his constitutional right to not be placed in jeopardy twice.

The crime involved here is embezzlement and Title 18 Chapter 24 Sections 01-07 define embezzlement. If the decision of the Idaho Supreme Court is allowed to stand a defendant could be charged in twenty different capacities for an offense arising out of the same set of facts and circumstances. The Court stated that it recognized the principle laid out in *Green v. United States* 355 U.S. 184 "...the State with all its resources and powers should not be allowed to make repeated attempts to convict an individual for an

alleged offense thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.", however, the present decision clearly ignores that principle by allowing successive prosecutions for the same offense. If the prosecution had failed in the second trial the Petitioner could have been tried a third time or fourth according to the present case merely by selecting another statute with which to charge him.

CONCLUSION

The Petitioner requests that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

JOHN K. GATCHEL

John K. Gatchel
Center Avenue & Ninth
Payette, Idaho 83661

ATTORNEY FOR PETITIONER

August 27, 1980

I certify that this Petition for a Writ of Certiorari was served by mail on August 27, 1980 to David Leroy Attorney General, State of Idaho Capital Building, Boise, Idaho; Steven M. Parry, Deputy Attorney General, State of Idaho Capital Building, Boise, Idaho and Ira M. Burton, Prosecuting Attorney for Washington County, 29 West Court Street, Weiser, Idaho.

JOHN K. GATCHEL

JOHN K. GATCHEL

Appendices

1980 Opinion No. 86

In the Supreme Court of the State of Idaho

No. 12624

STATE OF IDAHO,

Plaintiff-Respondent, Boise, December 1979 Term

v. Filed: April 22, 1980

STEPHEN DIRK WERNETH, R. H. Young, Clerk

Defendant-Appellant.

Appeal from the District Court of the Third Judicial District of the State of Idaho, Canyon County. Honorable Edward J. Lodge, District Judge.

Appeal from jury verdict finding defendant-appellant guilty of embezzlement by corporate officer. *Affirmed.*

Mr. John K. Gatchel, of Gatchel & Batt, Payette, for appellant.

Honorable David H. Leroy, Attorney General, State of Idaho; and Steven M. Parry, Deputy Attorney General, State of Idaho, Boise, for respondent.

SCOGGIN, J. Pro Tem.

Defendant-appellant, Stephen Werneth, appeals from a jury verdict finding him guilty of embezzlement by corporate officer under I.C.§ 18-2402.[1] Werneth claims that the jury trial violated his constitutioanl right not to be twice placed in jeopardy.

In April, 1976, Werneth was placed on trial for the crime of embezzlement by bailee under I.C. § 18-2407.[2] That charge was based on an allegation that Werneth fraudulently converted to his own use approximately eighteen tons of wheat which had been entrusted to him during the 1974 harvest season. As the trial progressed, a jury was empaneled, witnesses were sworn, and testimony by a State witness was taken. At that point, the State made a motion to amend the information to include the crime of embezzlement by corporate officer under I.C. § 18-2402. Werneth was apparently a corporate offier when he appropriated the wheat, and the proposed amendment was based on the same transaction as the charge under I.C. § 18-2407.

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[1] 18-2402. *Embezzlement by public and corporate officers.* — Every officer of this state, or of any county, city, or other municipal corporation or subdivision thereof, and every deputy, clerk, or servant of any such officer, and every officer, director, trustee, clerk, servant, or agent of any association, society, or corporation (public or private), who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fradulent intent to appropriate it to such use or purpose is guilty of embezzlement.

[2] 18-2407. *Embezzlement by bailee, tenant or attorney.* — Every person entrusted with any property as bailee, tenant, or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same or the proceeds thereof to his own use, or secretes it or them with a fraudulent intent to convert to his own use, is guilty of embezzlement.

Defense counsel objected to the amendment. The trial judge denied the motion to amend on the ground that the amendment was "an entirely different burden (from the original charge under I.C. § 18-2407) that the defense * * * is not prepared to meet. * * * The man is entitled to know what he is charged with."

The State then moved to dismiss the suit. Defense counsel objected and was questioned by the trial judge regarding his reasons for objecting. After a recess, defense counsel withdrew his objection. The trial judge then granted the motion to dismiss.

Four days later, the State charged Werneth with the crime of embezzlement by a corporate officer under I.C. § 18-2402. That charge, other than adding the allegation that Werneth was a corporate officer, was based on precisely the same allegations that were made in the previous charge under I.C. § 18-2407. Werneth filed a motion to dismiss claiming that a new trial would violate his right not to be placed in double jeopardy. The trial judge denied the motion on the ground that defense counsel had, in effect, consented to the previous dismissal by withdrawing his objections. A jury trial was held and Werneth was found guilty of embezzlement by a corporate officer. Werneth appeals from that verdict.

The primary issue in this case is whether Werneth was denied his constitutional right not to be twice placed in jeopardy for the same criminal offense. Werneth's constitutional rights stem from two sources. The first, the Idaho Constitution, Art. 1, § 13, provides that "[n]o person shall be twice put in jeopardy for the same offense * * *." The second source, the Fifth Amendment to the United States Constitution, states that "nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb * * *" and applies to the states through the Fourteenth Amendment. *Benton v. Maryland,* 395 U.S. 784 (1969).

Our resolution of Werneth's constitutional claim begins

with an examination of the trial court's ruling that Werneth consented to the dismissal of the I.C. § 18-2407 charge by first objecting to the State's motion to dismiss and then later withdrawing his objection. The general rule is that where the defendant himself moves to discharge the jury, or where he consents to such a move made by the court or the prosecution, he cannot claim double jeopardy if he is thereafter retried for the same offense. *E.g., United States v. Dinitz,* 424 U.S. 600 (1976); *United States v. Grasso,* 552 F.2d 46 (2d Cir. 1977). While no court appears to have dealt with the precise fact situation of the case at hand, a number of courts have held that a defendant's silence in the face of a state's motion to discharge the jury is not a consent to the discharge, and the defendant retains his right to claim double jeopardy. *E.g., State v. Fenton,* 506 P.2d 665 (Ariz. Ct. App. 1973); *People v. Compton,* 490 P.2d 537 (Cal. 1971); *People v. Hoffman,* 265 N.W.2d 94 (Mich. Ct. App. 1978); *State v. Ambrose,* 598 P.2d 354 (Utah 1979).

While something more than mere silence on the defendant's part must be shown to establish his consent to being placed in double jeopardy, the consent need not be express; rather, it may be implied from a totality of the circumstances. *See, e.g., United States v. Rich,* 589 F.2d 1025 (10th Cir. 1978); United States v. Goldman, *supra; Harris v. Justices of the Supreme Court,* 378 N.E.2d 1948 (N.Y. 1978). Stressing the view that consent to be placed in double jeopardy will not be lightly presumed, the court in *Curry v. Superior Court,* 470 P.2d 345 (Cal. 1970), stated: "It is true that affirmative conduct by the defendant may constitute a waiver if it clearly evidences consent * * *." *Id.* at 348. Idaho has consistently recognized the presumption against waiver of fundamental constitutional rights. *E.g., State v. Fisk,* 92 Idaho 675, 448 P.2d 768 (1968); *Abercrombie v. State,* 91 Idaho 586, 428 P.2d 505 (1967).

We disagree with the finding of the trial judge that the withdrawal of an objection constitutes the clear and une-

quivocal action necessary to find that the defendant has consented to placing himself in double jeopardy. Nevertheless, we affirm the trial court's result, albeit on a different ground. We agree with the argument presented by the State, both here and at the trial level, that the two statutory offenses with which Werneth was charged do not constitute the same offense for double jeopardy purposes. Where the decision of the trial court is correct but entered on a different theory, it will be affirmed on the correct theory. *E.g., Eimco Corp. v. Sims,* 100 Idaho 390, 598 P.2d 538 (1979); *Anderson & Naziger v. G. T. Newcomb, Inc.,* 100 Idaho 175, 595 P.2d 709 (1979).

The core principle of the Double Jeopardy Clause is that no person may be punished or prosecuted twice for the same offense. The issue we now turn to is whether Werneth was prosecuted twice for the same offense; specifically, we must determine whether I.C. § 18-2402 and I.C. § 18-2407 constitute the same offense for double jeopardy purposes.

The basic test for determining whether two statutory offenses are sufficiently distinguishable to permit the imposition of successive prosecutions was stated in *Brown v. Ohio,* 432 U.S. 161 (1977):

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. * * *." *Id.* at 166. [quoting *Blockburger v. United States,* 284 U.S. 299, 304 (1932)].

See also State v. Hall, 86 Idaho 63, 383 P.2d 602 (1963).

Under this test, I.C. § 18-2402 and I.C. § 18-2407 constitute two distinct offenses. I.C. § 18-2402 requires proof

that the embezzler was a public or corporate officer, which I.C. § 18-2407 does not require. On the other hand, I.C. § 18-2407 requires proof that the embezzler converted property to his own use which had been entrusted to him as bailee, tenant or lodger. I.C. § 18-2402 requires no such proof. Moreover, proof of facts necessary for conviction under one statute would necessarily preclude conviction under the other. Thus, each statute requires proof of an additional fact which the other does not. Under the *Blockburger* test, these two Idaho statutes are sufficiently distinguishable to permit successive prosecutions in the present case.[3]

We stress, however, that the result here might have been much different if the trial on the I.C. § 18-2407 charge had progressed to the point where some of the factual issues had been resolved:

---

[3]Although we are urged by the State to affirm the trial court on the basis of I.C. § 19-3506, we decline to do so. That statute reads as follows: "*Effect of dismissal as bar.* — An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense, if it is a misdemenaor; but it is not a bar if the offense is a felony."

The state argues that I.C. § 19-3506 is dispositive of this appeal; they argue that because Werneth's initial felony charge under I.C. § 18-2407 was dismissed, a second prosecution, even if based on the same offense, is proper under I.C. § 19-3505.

The language of I.C. § 19-3506 does appear to support such an argument, but applying that statute in the manner suggested by the State would violate the Double Jeopardy Clause. In Werneth's initial trial, a jury had been empaneled and sworn prior to the dismissal. In *Crist v. Bretz*, 437 U.S. 28 (1978), the Court held that jeopardy attaches when a jury is empaneled and sworn, and a subsequent trial on the same offense violates the constitutional guarantee against double jeopardy. It is unnecessary, however, to decide the constitutionality of I.C. § 19-3506 in the present case. Our decision is grounded on the finding that I.C. § 18-2402 and I.C. § 18-2407 are not the same offense for double jeopardy purposes, and thus I.C. § 19-3506 is inapplicable.

> "The *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." *Brown v. Ohio*, 432 U.S. 161, 167 n. 6.

It is clear, however, that no factual issues were ever resolved in the trial on the I.C. § 18-2407 charge.

Werneth argues that the dismissal of the I.C. § 18-2407 charge amounted to an acquittal and that his subsequent trial on the I.C. § 18-2402 charge was a violation of Idaho's statutory provision against double jeopardy, I.C. § 18-301. I.C. § 18-301 reads as follows:

> "*Acts punishable in different ways. — Double jeopardy.* — An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other."

It is clear that I.C. § 18-301 enlarges the scope of the constitutional guarantee against double jeopardy "for the same act or omission" and is not limited to the "same offense." *State v. Hall,* 86 Idaho 63, 383 P.2d 602 (1963). I.C. § 18-301 is, however, not applicable to the present case because Werneth was never acquitted of the I.C. § 18-2407 charge. Idaho's statutory definition of acquittal is as follows:

> "19-1718. *What is a former acquittal.* — Whenever the defendant is acquitted on the merits he is acquitted of the same offense, notwithstanding any defect in form or substance in the indictment on which the trial was had."

The United States Supreme Court has stated that a defendant is acquitted, "only when the ruling of the judge, whatever its label, actually represents a resolution (in the defendant's favor), correct or not, of some or all of the factual elements of the offense charged." *United States v. Scott,* 437 U.S. 82, 97 (1978) [quoting *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 571 (1977)]. Neither of these definitions leads to a conclusion that Werneth was acquitted of the I.C. § 18-2407 charge. His trial on that charge was dismissed before it resolved any facts or resulted in a decision on the merits. Thus, the dismissal cannot be equated with an acquittal. *See State v. Gumm,* 99 Idaho 549, 552 n. 2, 585 P.2d 959, 962 n. 2 (1978).

Werneth next argues that the case of *Crist v. Bretz,* 437 U.S. 28 (1978), requires reversal of the trial court's decision. *Crist* involved defendants charged with a crime under a single Montana statute. After a jury was empaneled and sworn, a typographical error was discovered in the information which made the information invalid. The prosecution's motion to dismiss the case was granted; the typographial error was corrected; the exact charges were refiled against the defendants; and the defentants were found guilty by a jury. The sole issue in the case was whether jeopardy had attached in the initial trial, thereby precluding the second trial; it was presumed that the second trial involved the "same offense" as the first. *Crist* is thus distinguishable from the present case in that *Crist* clearly involved a reprosecution for the "same offense" while the case at hand involved prosecutions for two distinct offenses.

Werneth also claims that the case of *Sanabria v. United*

States, 437 U.S. 54 (1978), supports his claim that he was tried twice for the same offense. *Sanabria,* however, did not deal with the question of whether successive prosecutions are proper for a single act which violates a number of statutes:

> "Because only a single violation of a single statute is at issue here, we do not analyze this case under the so-called 'same evidence' test, which is frequently used to determine whether a single transaction may give rise to separate prosecutions, convictions, and/or punishments under separate statutes." *Id.* at 70 n. 24.

Thus, *Sanabria,* not having dealth with the issue we face here, is distinguishable from the present case.

We recognize the principle laid out in *Green v. United States,* 355 U.S. 184 (1957), that

> "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Id.* at 187-88.

The second trial in the present case, however, involved none of the evils identified in *Green:* Werneth's first trial was dismissed before any factual issues were resolved, and his second trial involved a charge under a different statute. On the basis of the authorities discussed above, Werneth's constitutional guarantee against double jeopardy was not

violated in this case. The jury verdict finding Werneth guilty of a violation of I.C. § 18-2402 is affirmed.

DONALDSON, C.J., BAKES, McFADDEN and BISTLINE, JJ., concur.

SUPREME COURT
STATE OF IDAHO
Idaho

Boise,

SUPREME COURT NO. 12624

John K. Gatchel
Attorney at Law
Payette;
Hon. David H. Leroy
Attorney General
Boise;
Lynn E. Thomas
Deputy Attorney General
Boise,
Steven M. Parry
Deputy Attorney General
Boise

June 30, 1980

STATE OF IDAHO

Respondent,

v.

STEVEN DIRK WERNETH,

Defendant-Appellant.

GENTLEMEN:

In the above entitled cause the Court has today denied Appellant's Petition for Rehearing.

CLERK OF THE SUPREME
COURT
STATE OF IDAHO

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Payette, Idaho 83661
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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF WASHINGTON.

* * * * *

STATE OF IDAHO, CASE NO. 1054

—VS— MOTION TO DISMISS

STEPHEN DIRK WERNETH,

Defendant.

COMES NOW, John K. Gatchel, attorney for the defendant Stephen Dirk Werneth, and moves the Court for an Order of Dismissal of the above-entitled matter on the grounds and for the reasons that the defendant was formerly placed in jeopardy on the same charge. On April 26, 1976 in the District Court of the third Judicial District in and for the County of Canyon, Cases 3741, 3742 and 3743 entitled *State of Idaho v. Stephen Dirk Werneth,* Stephen Dirk Werneth being charged therein with the crime of embezzlement. The jury was empaneled and sworn, and a witness

was sworn and testified at which time the prosecuting attorney dismissed all charges. At the time that the jury was empaneled, jeopardy attached to the above cases and to allow the prosecutor to refile the cases would be placing the defendant in jeopardy for a second time. The present charge arose out of the same facts and circumstances as the three cases under which the same defendant had been charged.

John K. Gatchel
Attorney for Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF WASHINGTON

PRESIDING: Honorable Edward J. Lodge
DATE: April 5, 1977

STATE OF IDAHO,

Plaintiff,

-vs- COURT MINUTES

STEPHEN DIRK WERNETH, No. 1054

Defendant.

This matter was before the Court this 5th day of April, 1977 at 2:15 P.M. on Two (2) Motions as follows: 1. Motion to Dismiss. 2. Motion for Change of Venue. Present in Court was Lary C. Walker, Special Prosecutor, along with another member of his Law Firm, Ira T. Burton. Also present was Stephen Dirk Werneth, Defendant with his Attorney of record, Mr. John K. Gatchel of the Law Firm of Gatchel and Batt, Payette, Idaho.

Mr. Gatchel argued for his Motion to Dismiss claiming Double Jeopardy. Mr. Walker argued against said Motion, citing Lewis -vs- Anderson 94-254, etc., and Mr. Gatchel gave rebuttal argument in favor of his Motion to Dismiss.

The court will take the position that there was a consent and is going to do it for this reason. I would have allowed the amendment to the Information, so I don't think the defendant is being jeopardized by denying the motion.

The Court asked for argument on the Motion for change of venue. Mr. Gatchel argued for the Motion for change of

venue, Mr. Walker argued against said Motion and there was rebuttal argument by Mr. Gatchel.

The Court granted the motion on the basis that probably it was the Judgment of the prior Court that this should be done. The Court will concur with that motion and it will be transferred to Trial Court in Caldwell, Idaho.

EDWARD J. LODGE
District Judge

MARY KAUTZ
Clerk of the District Court

By: Vivienne Dickerson
Deputy

MINUTES OF THE DISTRICT COURT
WASHINGTON COUNTY — Criminal #C-3975
April 5, 1977

No. 80-341

In The

Supreme Court of the United States

October Term, 1980

STEPHEN DIRK WERNETH,

Petitioner,

vs.

THE STATE OF IDAHO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

RESPONDENT'S BRIEF IN OPPOSITION

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No. 80-341

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STATEMENT

Respondent, the State of Idaho, respectfully requests that the petition of Stephen Dirk Werneth for a writ of certiorari, to review the decision of the Supreme Court of Idaho be denied. The decision is reported at 611 P. 2d 1026 (1980).

REASONS WHY THE WRIT SHOULD BE DENIED

The dismissal of the first charge against petitioner was followed by the prosecution of a second and legally different charge against petitioner, in consequence of which petitioner's conviction of the subsequently charged offense was not violative of the Double Jeopardy Clause of the Constitution.

Petitioner, Werneth, presents only an assertion that the Double Jeopardy Clause was violated in his case.

Werneth was at first charged with embezzlement by a bailee, a violation of § 18-2407 of the *Idaho Code*. After a jury had been empaneled and witnesses sworn, the State moved to amend the Information in order to charge embezzlement by a corporate officer, a violation of *Idaho Code*, § 18-2402, instead of embezzlement by a bailee, to which Werneth objected. After failing in this effort, the State moved to dismiss in order to file a new charge, based on the same transaction, but charging an embezzlement by a corporate officer. *State v. Werneth*, 611 P. 2d 1026 (1980).

The Idaho Supreme Court concluded that Werneth had not been twice placed in jeopardy for the same offense. The court reasoned that the two charges were different, as judged by tests previously stated by this Court.

> . . . I. C. § 18-2402 and I. C. § 18-2407 constitute two distinct offenses. I. C. § 18-2402 requires proof that the embezzler was a public or corporate officer, which I. C. § 18-2407 does not require. On the other hand, I. C. § 18-2407 requires proof that the embezzler converted property to his own use which had been entrusted to him as bailee, tenant or lodger. I. C. § 18-2402 requires no such proof. Moreover, proof of facts necessary for conviction under one statute would nec-

> essarily preclude conviction under the other. Thus, each statute requires proof of an additional fact which the other does not. Under the *Blockburger*[1] test, these two Idaho statutes are sufficiently distinguishable to permit successive prosecutions in the present case.
>
> *State v. Werneth,* 611 P. 2d at 1028.

It is apparent that had petitioner been tried and convicted of the offense of embezzlement by a bailee, when the proof showed that he held the embezzled property as a corporate officer, he would have been entitled under Idaho law to prevail on appeal because a material variance between the pleading and the proof *could* subject an accused to the risk of being placed twice in jeopardy, or being misled in preparing his defense. The Idaho Supreme Court has held that such a variance is impermissible, *State v. Love,* 76 Idaho 378, 283 P. 2d 925 (1955), which persuasively indicates that the two offenses are legally different and that the petitioner was never in jeopardy of conviction of the first charge. The Double Jeopardy Clause is not implicated unless the defendant has been put to the risk of conviction. *Serfass v. United States,* 420 U. S. 377 (1975).

In *Brown v. Ohio,* 432 U. S. 161 (1977), this Court held that where the same transaction is violative of two different statutes, the test of whether there are two distinct offenses, for the purpose of double jeopardy analysis, is whether each statute requires proof of some additional fact which is not part of the proof necessary to establish a violation of the other. *See also: Blockburger v. United States, supra.*

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1 *Blockburger v. United States,* 284 U. S. 299 (1932).

The purpose of the Double Jeopardy Clause to bar successive prosecutions is served by the *Blockburger* test.

> This test emphasizes the elements of the two crimes: "If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. . . ." Iannelli v. United States, 420 U. S. 770, 785 n. 17 (1975).
>
> If two offenses are the same under this test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions.
>
> *Brown v. Ohio,* 432 U. S. at 166.

Petitioner argues that he was in jeopardy at his first trial because the jury was sworn before the charge was dismissed. That fact is not always controlling. A mid-trial dismissal procured by defendant for reasons not affecting the question of factual guilt or innocence does not bar a succeeding prosecution for the *same* offense. *United States v. Scott,* 437 U. S. 82 (1978). That being the case, it can hardly be thought that a successive trial on a *different* charge is barred by the Double Jeopardy Clause. *Brown v. Ohio, supra.*

Petitioner's reliance on *Crist v. Bretz,* 437 U. S. 28 (1978), is misplaced. The question decided there was whether the federal rule that jeopardy attaches after the jury has been empaneled was of constitutional dimension, not whether the Double Jeopardy Clause bars a succeeding trial on a different charge arising out of the same transaction.

———o———

CONCLUSION

For the reasons stated, the petition of Stephen Dirk Werneth for a writ of certiorari should be denied.

Respectfully submitted,

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